

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUCAS DANIEL BURNETT,

Defendant-Appellant.

UNPUBLISHED

March 27, 2007

No. 267894

Oakland Circuit Court

LC No. 2005-203990-FH

Before: Zahra, P.J. and Bandstra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction of assaulting a deputy sheriff causing injury, MCL 750.81d(2), for which he was sentenced as an habitual offender, fourth offense, MCL 769.12, to 60 to 180 months in prison. We affirm defendant's conviction but vacate his sentence and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The charge arose out of an incident in which defendant assaulted a deputy sheriff after he was sentenced for a prior conviction. The prosecution sought to introduce evidence that defendant received a sentence of 10 to 40 years' imprisonment for the prior conviction. The trial court ruled that the fact that defendant received a prison sentence was admissible but the length of the sentence was not. Defendant does not dispute that the fact that he was in court for sentencing was admissible, but contends that the fact that he received a prison sentence was not. A review of the record shows that while defense counsel initially sought to limit the evidence to the fact that defendant was appearing in the other courtroom for sentencing, he ultimately agreed that the fact that defendant received a prison sentence was admissible, but urged the court not to allow disclosure of the length of the sentence. Over the prosecutor's objection, the trial court ruled that while the fact that defendant received a prison sentence could be disclosed, the length of the sentence could not. Because the trial court's decision was in accord with what defense counsel requested, any claim of error has been waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant next argues that he is entitled to resentencing because the trial court erred in scoring 15 points for offense variable 10 of the sentencing guidelines. MCL 777.40. We agree.

The court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). "A sentencing court has discretion

in determining the number of points to be scored provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision “for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). “Where effectively challenged, a sentencing factor need be proved only by a preponderance of the evidence.” *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Defendant was assessed 15 points for predatory conduct. MCL 777.40(1)(a). Predatory conduct is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). Such conduct generally consists of targeting the victim of the offense and watching and waiting for an opportunity to attack. *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003); *People v Kimble*, 252 Mich App 269, 274-275; 651 NW2d 798 (2002), *aff’d* 470 Mich 305 (2004). There is no evidence that defendant engaged in any preoffense conduct in order to victimize the deputy.¹ To the contrary, the attack in the courtroom appears to have been an impulsive act that was directed at the victim only because she was the most convenient representative of the state on whom defendant could take out his anger and frustration. The evidence did not support a finding of predatory conduct.

A reduction of 15 points in defendant’s offense variable score would change his sentencing category from F-IV to F-III, and would reduce the minimum sentence range from 17 to 60 months to 14 to 58 months. MCL 777.21(3)(c); MCL 777.67. Because the trial court utilized the wrong minimum sentence range in sentencing defendant, resentencing is required. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

Defendant’s conviction is affirmed. Defendant’s sentence is vacated and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens

¹ While defendant had previously made a general threat to “assault deputies,” that threat consisted of words, not conduct, and it was not directed at the victim of this offense in particular. Cf. *People v Hindman*, 472 Mich 875, 876; 693 NW2d 384 (2005) (exploitive conduct must be directed at the victim of the criminal offense being scored, not third persons).